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NO. 82-1362

In the Supreme Court of the United States

October Term, 1982

GREAT LAKES DREDGE AND DOCK COMPANY, a corporation,

Petitioner

vs.

GERMAN EBANKS, et al.

Respondents

RESPONSE ON BEHALF OF RESPONDENTS GENE MOORE, HENLEY SMITH AND EDWARD BURKE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The opinion of the Court of Appeals for the Eleventh Circuit is reported at: *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982).

STATEMENT OF PERTINENT FACTS

Following the collision as described in the petition herein, Chevron Transportation Corporation (Chevron) filed suit to limit its liability to the value of the M/V Robert Watt Miller, and its pending freight, pursuant to 46 U.S.C. 183 et. seq.

Great Lakes Dredge & Dock Co., (Great Lakes) filed a claim for its collision damages in that action, and so did all the injured members of the crew of the Dredge Alaska who are respondents herein, as did the families of two crewmen who were drowned, one of whom settled with both Chevron and Great Lakes prior to trial.

Great Lakes did not file a petition under 46 U.S.C. 183 to seek exoneration from or limit its liability.

After the settlements by all of these Respondents with Chevron, which were approved by Great Lakes, those claims were dismissed. The claim of Great Lakes and the counter-claim by Chevron against Great Lakes remained open, and are pending in the limitation action.

The injured seamen, and the personal representatives of the deceased seamen, employees of Great Lakes, filed individual actions against the employer under the

Jones Act, 46 U.S.C. 688, each demanding trial by jury. All the cases were consolidated for pretrial discovery and proceedings, but not for trial. They could not be tried together because the limitation of liability action is in Admiralty, Rule 9(h), Federal Rules of Civil Procedure, without a jury, Rule 38(e), while the Jones Act actions are jury trials. Additionally, the seamen's warranty of the seaworthiness of their vessel, *The Osceola*, 189 U.S. 158, 47 L.Ed. 760, 23 S.Ct. 483 (1903), does not apply to Chevron's tanker as to them making the proofs and cross-examinations entirely irreconcilable. Nor should the seamen be subjected to cross-examination by a party with whom they no longer have a dispute. All of the Jones Act cases were consolidated for one trial on liability.

With Chevron gone, the seamen proceeded to trial against Great Lakes. After the jury was seated, Great Lakes raised the issue of the jury determining the comparative fault between Great Lakes and the absent Chevron. Over the seamen's strenuous objections, the Trial Judge agreed, forcing them to represent Chevron, in an action which could not bind Chevron to its results.

This was the posture of the proceedings at the time the presentation of testimony commenced.

RESPONDENTS' ARGUMENT AGAINST GRANTING THE WRIT

To have required the seamen to take the part of the absent shipowner for determination of the comparative fault of the colliding vessels to collect a part of their damages from each of the negligent shipowners, and never be fully compensated, is violative of the long-standing tradition of admiralty law. It certainly does not represent any sense of fairness.

These two shipowners have an existing forum for the resolution of their differences, where their comparative fault can be resolved in head-to-head combat, without surrogates. Any finding by the jury could not have been binding on Chevron on any concept of *res adjudicata*, or estoppel by judgment, and the issue of comparative fault must be fully tried between them, when they meet in the pending admiralty action.

And that is exactly what this Court provided for them in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), which was rendered shortly after the judgments were entered by the Trial Court in the cause at bar. When cited to the Trial Judge in post-trial motions, it was not applied.

The operative portion of the opinion in *Edmonds*, as applicable herein, is set out in footnote 30, wherein this Court stated that Congress did not intend upsetting the rule that a Plaintiff may recover from one of the colliding vessels the damages concurrently caused by the negligence of both, and further if the respondent vessel has any rights against the absent vessel, they

must be settled in another proceeding. The Eleventh Circuit, in reversing the judgments, remanded the cases to the District Court to follow this declaration, and set out footnote 30 in full as part of its opinion. See, Petitioner's Appendix, page A-13.

On the other side of this total litigation, the ultimate determination of the comparative fault between the shipowners by the admiralty judge cannot be binding on the seamen.

In this vein, we refer the Court to Section 768.31, Florida Statutes, for statutory procedure on settlement by a Plaintiff with one of several joint tortfeasors, rather than the Oregon statute relied on by Petitioner. We specifically cite Subsection (5) of the statute where it provides that the amount of the settlement shall be set off from the judgment the Plaintiff receives from the non-settling wrongdoer.

The collision herein occurred in the St. Johns River within the territorial limits of Duval County, Florida, and the trials were and will be held in the Middle District of Florida.

In *Edmonds, supra,* this Court held that the traditional concept of maritime law is still the law, presumably as codified in the Florida statutes. See also, Section 46.015(2), Florida Statutes.

It is within the context of this background that this Court stated in *Edmonds:*

> "For a number of reasons, we are unpersuaded that Congress intended to upset a long established and familiar principle of maritime law by imposing a proportionate fault rule."

If Congress did not, in the 1972 amendments to the Longshore & Harbor Workers' Compensation Act, intend to upset a long standing principle of maritime law referrable to longshore torts, it would seem that this Court was upholding the principle long applicable to all maritime cases, including those under the Jones Act, and the General Maritime Law.

However, this case was tried before the jury on a proportionate recovery of damages rule—not of maritime origin—in conflict with the traditional maritime rule.

The Robert Watt Miller was under the control of a bar pilot. In such a situation, there is no question but that Chevron could have limited its liability in this case, and limited the damages the seamen could have collected out of Chevron's posted bond. *Petition of the Farrell Lines*, 530 F.2d 7 (5th Cir. 1976).

But Petitioner would have this Court now, only three years later, impose such a proportionate damages rule, so that these seamen could collect only part of their damages from each shipowner, rather than for them to collect full damages and allow the negligent shipowners to resolve their proportionate fault between them in the litigation pending before the admiralty judge.

If any error was made in the judgment of the Eleventh Circuit, it was in the failure to remand the

case for the sole purpose of setting the seamen's damages. The jury already found Petitioner negligent. Causation is merely a legal application of the law expounded in, *Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 143 (5th Cir. 1980). This opinion was rendered after the notice of appeal was filed herein, and the Appellate Court left it to the Trial Judge to apply the *Reyes* principles to this action. By application of *Reyes*, the seamen's motions for directed verdict, or judgment N.O.V., should have been granted.

The further ground for seeking review in this Court seems to be the shipowner's whine about being subjected to some sort of peril of double jeopardy. They seem to be attempting to put themselves into a criminal posture, i.e., once having been exonerated, they shouldn't be subjected to a second trial. We know of no such principle of civil law.

It is respectfully submitted that the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

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